TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1927

No. [redacted] 17

WILLIAM C. ATWATER & COMPANY, INCORPORATED, APPELLANT,

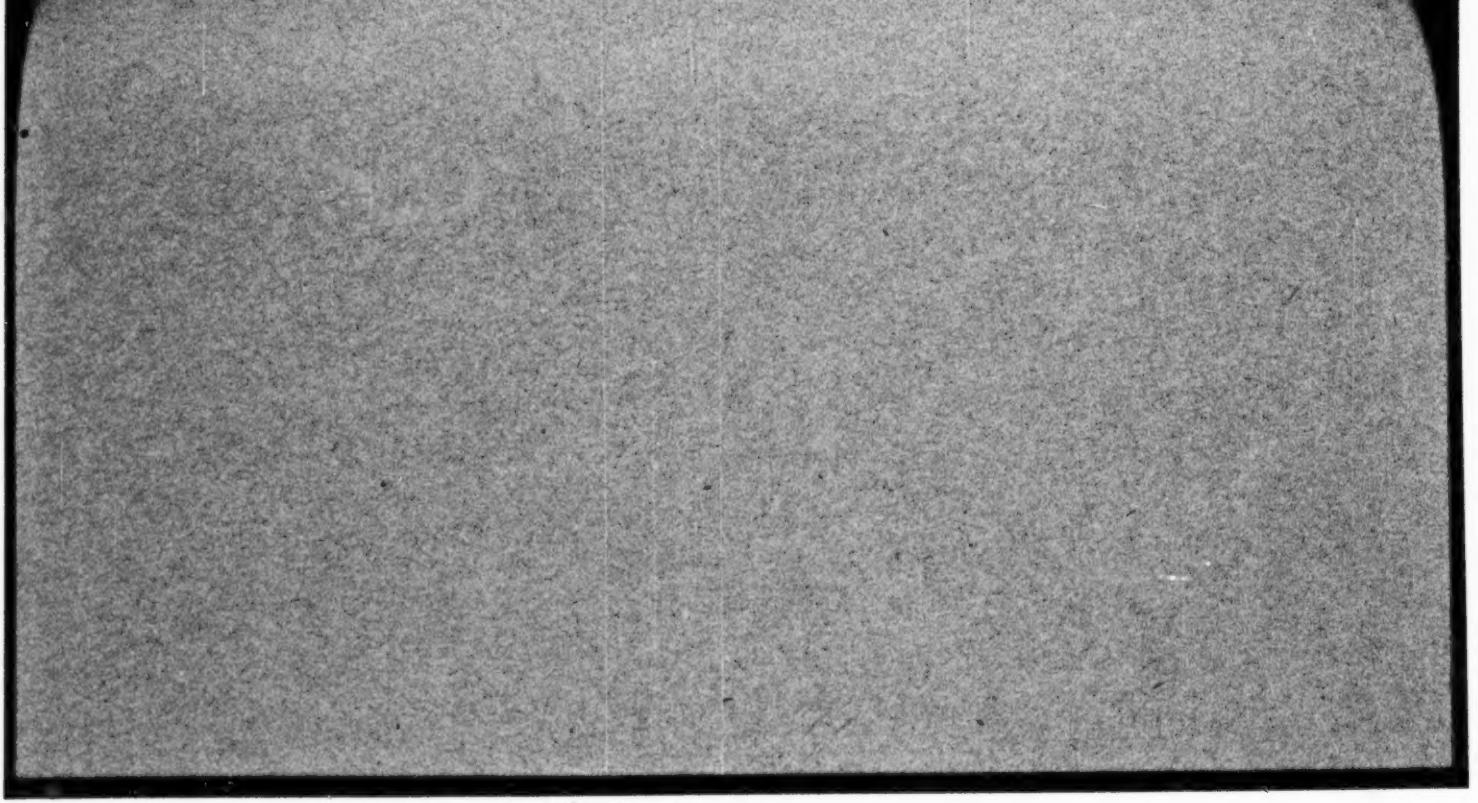
vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 3, 1927

(31,245)



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 522

WILLIAM C. ATWATER & COMPANY, INCORPORATED, APPELLANT,

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 21, 1925

[fol. 1] **IN COURT OF CLAIMS OF THE UNITED STATES**

No. D–832

WILLIAM C. ATWATER & COMPANY, INCORPORATED

vs.

THE UNITED STATES

I. MINUTE ENTRIES

On October 29, 1924, the plaintiff filed its original petition.

On November 18, 1924, by leave of court, the plaintiff filed its Amended Petition.

Said amended petition is as follows:

II. AMENDED PETITION—Filed Nov. 18, 1924

To the Honorable Justices of the United States Court of Claims:

William C. Atwater & Company, Inc., files this its amended petition and respectfully represents:

For a First Cause of Action

1. That it is, and at all times hereinafter mentioned was, a corporation created by and existing under and by virtue of the Laws of the State of New York, having its principal office or place of business at No. 1 Broadway, New York City, New York, and operating branch offices in Boston, Norfolk, Cleveland, Bluefield, London and elsewhere, engaged in the business of shipping Pocahontas Smokeless Coal and Coke; that it has at all times, through its officers and agents, borne true allegiance to the United States of America, and has not in any way voluntarily aided, abetted or given encourage-[fol. 2] ment to rebellion against the said Government; and that it is the sole owner of the claim hereinafter presented, never having sold or assigned the same, or any part thereof or any interest therein to any person.

2. That in the month of June, 1917, an unincorporated association of shippers of bituminous coal to the tide-water ports of Hampton Roads, Baltimore, Philadelphia and New York, was organized and known as the Tidewater Coal Exchange, the general purpose of which association was to expedite the transshipment of coal from cars to boats at the above mentioned ports and thus release rolling stock which would be made available to move a larger amount of coal; that the organizers of the Exchange adopted rules for its management and operation on June 20th, 1917, a true copy whereof is hereunto annexed marked "Exhibit B" and made a part hereof.

3. That on or about the 6th day of November, 1917, the United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated August 23rd, 1917, appointing said Administrator, and in furtherance of the purpose of said order and of the Act of Congress therein referred to and approved August 10th, 1917, issued an order, a true copy whereof is hereunto annexed marked "Exhibit A" and made a part hereof.

4. That the order aforesaid adopted and approved the rules of the Tidewater Coal Exchange and made the same a part of said order and a copy of said rules was annexed to said order and therein referred to; and by said order Rembrandt Peale, Commissioner of said Tidewater Coal Exchange, was designated and appointed as the representative of the said Fuel Administrator to carry out the provisions thereof.

[fol. 3] 5. That by the terms of said order every shipper of bituminous coal for transshipment at the ports of Hampton Roads, Baltimore, Philadelphia and New York, or any one of the ports near or usually considered as tributary to said ports, was required on and after November 11th, 1917, to consign all such shipments of coal to said Tidewater Coal Exchange in accordance with and subject to the provisions of the existing Tidewater Coal Exchange rules in the same way, to the same extent, and with the same rights and liabilities respecting such shipments and the transshipment and delivery of the coal included therein, as under the terms of said rules applied to members of said Tidewater Coal Exchange, and said order further provided that no change should be made in said rules and no additional rules should be adopted affecting shippers subject to said order without first receiving the approval of said United States Fuel Administrator, so long as said order was in effect, which order was in full force and effect at the time and times hereinafter mentioned.

6. That under and by virtue of the terms of said order and the rules of the Tidewater Coal Exchange, the defendant, acting through said United States Fuel Administrator, its duly authorized representative, represented and agreed that any and all coal shipped by any shipper of coal subject to said order should be credited to said shipper in accordance with the rules of the Tidewater Coal Exchange aforesaid.

7. That the order of the Fuel Administrator aforesaid and the rules of the Tidewater Coal Exchange provided that all bituminous coal shipped to tidewater ports should be pooled with other Tidewater coal shipments of the same classification to said ports, and that each shipper should be credited in the pools to which he had made [fol. 4] shipments with an amount of coal equivalent to the amount theretofore shipped by him, and such was the custom and usage established and in effect at all the times when said rules were in force.

8. That at divers times subsequent to November 11th, 1917, and prior to December 5th, 1918, your claimant was a shipper of coal subject to the terms of the order aforesaid hereunto annexed marked "Exhibit A," and in accordance with the terms of said order and the rules of the Tidewater Coal Exchange approved and adopted thereby, your claimant shipped certain bituminous coal consigned to said Tidewater Coal Exchange.

9. That at divers times subsequent to November 11th, 1917, and prior to December 5th, 1918, the defendant, acting through said United States Fuel Administrator, its duly authorized representative, withheld from and failed to credit your claimant with coal shipped by your claimant to said Tidewater Coal Exchange as aforesaid to the aggregate amount of 34,143 net tons, which your claimant was ready, able and willing to receive at the time and times when your claimant was entitled to credit therefor under said order, and did not credit your claimant therewith until December 5th, 1918, on which date said Fuel Administrator increased the amount of your claimant's coal credits by the said 34,143 net tons, as follows:

Pool No. 1	7,824	net tons.
Pool No. 2	24,069	" "
Pool No. 6	2,375	" "
Total	34,268	" "
Less reduction in Pool No. 3	125	" "
Net increased credits	34,143	" "

[fol. 5] 10. That during the period subsequent to November 11th, 1917, and prior to December 5th, 1918, there was a ready and constant demand and market for said coal for export to foreign countries and for bunkering purposes at Lambert's Point, Hampton Roads, Virginia, where said coal was shipped by your claimant as aforesaid, and said coal was then and there being continuously sold in large quantities, and your claimant avers that said demand would readily have absorbed all the coal for which your claimant was entitled to credit under the order of the United States Fuel Administrator and the rules of the Tidewater Coal Exchange aforesaid.

11. That during the period subsequent to November 11th, 1917, and prior to December 5th, 1918, the market price of coal shipped for export from Lambert's Point, Virginia, ranged from $3.80 to $4.20 per net ton at the mines and that said price was the fair and reasonable value of the coal which said Fuel Administrator withheld and failed to credit to your claimant as aforesaid.

12. That about 26,444 net tons of the coal withheld from your claimant and which your claimant did not receive credit for as aforesaid was in tonnage of Pool No. 2 coal and Pool No. 6 coal, for which there was practically no market whatever in quantity after December

5th, 1918, and that your claimant sold said 26,444 net tons subsequent to the time when said tonnage was credited to it at the highest obtainable prices ranging from $2.35 to $2.75 per net ton at the mines.

13. Your claimant avers that its claim is founded upon the Fifth Amendment to the Constitution of the United States, and jurisdiction thereof is vested in this Court by the provisions of the Judicial Code, Section 145.

14. That by reason of the facts aforesaid your claimant has been [fol. 6] damaged in the sum of Fifty Thousand Dollars ($50,000).

15. Claimant avers that it is entitled to compensation at the rate of six per centum (6%) per annum upon the amount of damages aforesaid, to wit, Fifty Thousand Dollars ($50,000), from the 5th day of December, 1918, and that said rate of six per centum (6%) per annum is the fair and reasonable value for the use of money during the period covered by this claim, and at all times thereafter, up to and including the present time.

For a Second Cause of Action

16. Claimant repeats and realleges each and every allegation in paragraphs 1 to 12 inclusive, 14 and 15 herein contained.

17. Your claimant avers that its claim is founded upon an implied contract and jurisdiction thereof is vested in this Court by the provisions of the Judicial Code, Section 145.

Wherefore, claimant demands judgment against the defendant in the sum of Fifty Thousand Dollars ($50,000), together with just compensation as aforesaid.

William C. Atwater & Company, Inc., by John L. Steinbugler, Secretary.

[fol. 7] Sworn to by John L. Steinbugler. Jurat omitted in printing.

[fol. 8] Exhibit A to Petition

Order relative to tidewater transshipment of coal at Hampton Roads, Baltimore, Philadelphia, and New York and for the employment of and co-operation with the Tidewater Coal Exchange, so called, as a common agency to facilitate such transshipment and to reduce delays in the use of coal cars and coal-carrying vessels.

United States Fuel Administration

Washington, D. C., November 6, 1917.

It appearing to the United States Fuel Administrator that the production of coal intended for transshipment at the tidewater

ports of Hampton Roads, Baltimore,, Philadelphia and New York and ports near or usually considered as tributary to said ports is being restricted, and that the loading of coal-carrying vessels and the unloading of coal cars at such ports and the movement, arrival and return of such vessels and cars at and from such ports are congested and delayed, and that the shipment of coal from such ports is reduced in quantity, and that the distribution of coal to consumers in the territory tributary to the ports to which such coal is destined is less efficient, prompt and reasonable than is necessary for the efficient prosecution of the war, and that delay is occasioned in the delivery of coal for vessels of the navy and transports of the army, by reason of the continuance of individual shipments of coal by various producers upon the lines of coal-carrying roads having terminal at the ports aforesaid, and of individual and distinct transshipments of such coal at such ports only to coal-carrying vessels specially chartered or designated for the transshipment thereat of such individual [fol. 9] shipments, and that the objectionable conditions aforesaid can be largely eliminated and the production, shipment and distribution of coal from said ports both for the army and navy and for consumers in the territories aforesaid can be hastened and improved by the employment of and co-operation with a common agency at each transshipment point in the manner and with the powers hereinafter provided, and that such employment of and co-operation with a common agency is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the army and navy, and to assure an adequate supply and equitable distribution and to facilitate the movement, and to prevent locally or generally scarcity, of coal.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated 23 August, 1917, appointing said Administrator, and in furtherance of the purpose of said order and of the Act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that, until further or other order of the United States Fuel Administrator and subject to modification hereafter by him at any time and from time to time, the following rules are established for the regulation, to the extent hereinafter provided, of the method of production, sale, shipment, distribution, apportionment and storage of bituminous coal for transshipment at the ports aforesaid:

(1) Every shipper of bituminous coal for transshipment at any one of the ports at Hampton Roads, Baltimore, Philadelphia, and New York and ports near or usually considered as tributary to said ports, shall on and after November 11, 1917, consign all such shipments of coal to the Tidewater Coal Exchange so called, (of which [fol. 10] Rembrandt Peale is the Commissioner. Such shipments and consignments shall be made by each such shipper in accordance with and subject to the provisions of the existing Tidewater Coal Exchange rules in the same way, to the same extent, and with the same rights and liabilities respecting such shipments and the trans-

shipment and delivery of the coal included therein, as under the terms of said rules apply to members of said Tidewater Coal Exchange, but no such shipper subject to this order shall be required by reason of anything herein to become a member of said Tidewater Coal Exchange. A copy of said rules is annexed to this order and hereby referred to. Wherever said rules refer or mention a "member" or "members" of said Tidewater Coal Exchange, said terms shall with respect to this order and shippers subject hereto be deemed to mean a shipper or shippers of coal who are subject to this order; and wherever the "effective date" of the Exchange or of said rules is referred to therein, such reference shall be deemed, with respect hereto and to the shippers subject hereto, to refer to the effective date of this order.

(2) Bituminous coal consigned under the provisions of this order shall be graded and classified in accordance with "Exhibit B" Consigning Pool Numbers, referred to in said rules of the Tidewater Coal Exchange, as modified, cancelled or superseded by the provisions of Classification C, dated July 15, 1917, Classification D, dated July 17, 1917, Classification E, dated July 19, 1917, and Classification F, dated July 27, 1917, and in accordance with the provisions of said Classifications C to F, inclusive, wherever applicable, copies of which and of said "Exhibit B" are on file with this order in the office of the United States Fuel Administrator for inspection by any shipper subject hereto. Changes in said classification shall not be [fol. 11] made against the objection of any shipper subject hereto, except after approval of such changes by the United States Fuel Administrator. Upon application from any shipper subject hereto, the representative of the United States Fuel Administrator appointed under the provisions of paragraph (3) of this order is directed to furnish copies of said "Exhibit B" and said Classification C to F to such shipper.

(3) Said Rembrandt Peale, Commissioner of said Tidewater Exchange, is hereby designated and appointed as the representative of the Fuel Administrator to carry out the provisions of this order, with power to appoint deputies representing him as such representative of the United States Fuel Administrator at any one or all of the ports aforesaid; and in case of any disagreement or controversy between any shipper subject to the provisions hereof, and said commissioner with respect to any shipment or transshipment of coal or other matter arising under this order, or if any decision under rule No. 15 of the said Tidewater Coal Exchange rules hereto annexed, which would be final as to any member of said Exchange, is unsatisfactory to any shipper subject to the provisions hereof, such shipper may appeal to the United States Fuel Administrator.

(4) No change shall be made in said rules of the Tidewater Coal Exchange above referred to, a copy of which is annexed to this order and no additional rules shall be adopted affecting shippers subject to this order, without first receiving the approval of the United States Fuel Administrator.

(5) No change shall be made in the membership of the Executive Committee of said Tidewater Exchange, except with the approval of the United States Fuel Administrator as long as this order is in effect.

[fol. 12] (6) Any shipper subject to the provisions of this order may at any time apply to the United States Fuel Administrator for suspension or termination of the order upon the ground that its continuance is no longer essential to the national security and defense and for the successful prosecution of the war in which the United States is at present engaged.

(7) A copy hereof shall be served upon each of the railroad or railway companies and upon each of the producers of bituminous coal named in the list marked "Exhibit I to the Tidewater Coal Exchange Transshipment Order of the United States Fuel Administrator dated November 6, 1917."

(Signed) H. A. Garfield, United States Fuel Administrator.

[fol. 13] EXHIBIT B TO PETITION

Tidewater Coal Exchange Rules

1. All bituminous coal for transshipment at tidewater ports shall be graded as to kinds and classified as to designated consigning pools under the direction of the Executive Committee elected at the meeting of bituminous coal shippers held in Philadelphia on June 4th, 1917. The grades and classifications to conform to Exhibit B, which shows the pool numbers authorized by the Executive Committee. The Executive Committee may, after due hearing, amend the rules.

Any tidewater coal shipper or consigner may become a member of the Exchange upon furnishing references which will meet with the approval of the Executive Committee; and by subscribing to agreements providing for the handling of his (or its) coal in conformity with regulations governing the exchange of tidewater coal.

2. Shipping instructions and railroad way-bills (revenue and memorandum) shall give the Tidewater Coal Exchange as the consignee; shall show the proper pool number as per Exhibit B, and for whose account shipped. Example: "Tidewater Coal Exchange, Pool 30, account Westmoreland Coal Company."

3. Each member of the Exchange shall provide that each mine operator shipping bituminous coal for his account to the Exchange shall prepare and forward daily by United States mail to the Exchange office at destination port a report on Form 1, showing the initials and number of all cars shipped, with necessary details.

4. Members shall report to the Exchange office at destination port daily at a designated hour the names of the vessels which they have

[fol. 14] chartered for loading for their accounts with the tonnage and pool number of the coal to be loaded into each and the probable arriving time of the vessels at the coal pier. If the vessel is loaded, the commodity should be given.

5. Carriers will send to the Exchange office at destination port, daily, report on Form 2, or copies of scale sheets, showing weight and other information in connection with shipments, and will also report corrections in billing involving weights.

6. Carriers will send to the Exchange office at destination port, weekly, report on Form 3, showing reconsignment of shipments from or to the Exchange.

7. Carriers will report daily, except Sundays and holidays, to the Exchange office at destination port, on Form 4, the number of cars of each pool number at the port and en route, and the approximate time of arrival in twenty-four-hour periods.

8. The Exchange shall issue to each carrier a daily report or reports showing the conditions at each of its tidewater terminals, which reports shall be made on Bulletin Form 7, showing the number of tons of coal reported shipped to date, unloaded into vessels to date, and the standing of each member in each designated consigning pool. This bulletin shall be accompanied by vessel situation report on Form 8. The Exchange shall likewise report daily to each member thereof on Form 9 the tonnage added to or deducted from his account.

9. The assignment of coal to members shall be authorized by the Exchange and no assignment shall be made in excess of the tonnage which such member or members have in the designated consigning pool.

No member shall be entitled to any coal from a designated consigning pool when the accounts indicate that the member has over-[fol. 15] drawn from that pool, unless due to some extraordinary conditions the Commissioner may deem an exception advisable.

This shall not prevent a member from borrowing coal in the pool from any other member having a credit, but such transactions must be between the individual members and authorized by them to the Commissioner in writing.

10. When differences between the tonnage of coal shipped by a member and the tonnage of coal dumped into vessels for his account exist and the differences cannot be adjusted either by additional shipments or exchange of coal, the Executive Committee shall name a price to the Commissioner of the Exchange for the tonnage involved, and the Commissioner shall authorize such debits or credits as may be necessary to properly adjust the differences.

11. In some instances coal originating in different fields will be shipped to tidewater ports under one pool number but under different transportation rates. Adjustments between members of the Exchange

handling the cargo or bunker coal necessitated by such differences shall be made under the direction of the Commissioner.

12. The account of a member in one designated consigning pool shall not have any bearing on his account in another pool at the same port or other ports. Members, however, shall be permitted to offset overdrafts of one pool with shipments made to the same pool at another port subject to the approval of the Commissioner.

13. Failure of a member to provide vessels in which to transport coal from any port shall constitute the basis for the issuance of embargoes prohibiting the forwarding of shipments of coal from mines [fol. 16] for his account. No one who has been so embargoed shall be permitted to ship coal to any designated consigning pool until he has given satisfactory evidence to the Commissioner that he has made proper arrangements for vessels.

14. The Exchange shall sign the average demurrage agreement with each carrier at each port. In the application of car demurrage rules each carrier shall treat each port at which cargo or vessel fuel coal may be unloaded from cars to vessels, separately; and shall include all coal unloaded from cars into vessels in one demurrage account.

Each carrier shall render bill against the Exchange at the close of each calendar month covering all demurrage accruing during the month, and upon receipt of this bill the Commissioner will collect from each member his proportion on the basis of his tonnage loaded by the carrier assessing the demurrage into vessels registering during the calendar month within which the said demurrage charges accrued, and pay each carrier the amount due.

15. In the event of controversies with reference to the operation of the Exchange which cannot be adjusted by the Commissioner, they will be submitted to the Executive Committee and the proper Railroad Committee in joint session and their decision shall be final.

16. The Commissioner of the Tidewater Coal Exchange must be in position at all times to give prompt orders to the agents of the carriers to move from their respective tracks to the vessels, cargo or vessel fuel coal consigned to the "Tidewater Coal Exchange," as soon as vessels are ready for loading. In order to properly protect the charges of the carriers, it will be necessary for all consignees, members of the Tidewater Coal Exchange, to file with the carriers orders to make deliveries on the written instructions of the Commissioner [fol. 17] or his authorized representative; and in order to expedite these movements, consignees must furnish a blanket order prepared on Exchange Form "B" as follows:

"Until further notice you are hereby authorized to accept from the Commissioner of the Tidewater Coal Exchange, or his Deputy, his written orders to deliver to any vessel any coal for tidewater shipment or vessel fuel received at —— Station, consigned to Tidewater Coal Exchange, for account of the undersigned."

Members of the Exchange, on whose account a vessel is loaded with cargo or vessel fuel coal, shall be responsible to the railroad for the freight charges (when billed collect) and vessel loading charges on all cars of coal unloaded into the vessel.

Members shall sign an agreement on Exchange Form "C" to the effect that they will be responsible for, and pay all freight charges (when way-billed collect), and vessel loading charges and assigned proportion of any demurrage charges on all cars unloaded into vessels for their account, this agreement reading as follows:

"I (or we) hereby agree to pay all freight charges, when way-billed collect, loading charges and car demurrage charges assigned against me (or us) by authority of the Commissioner of the Tidewater Coal Exchange on coal shipments going into vessels for my (or our) account at any tidewater port under the Tidewater Coal Exchange Agreement, whether shipped from mines or obtained elsewhere for my (or our) account or for the account of any other member of the Exchange."

17. Each carrier must send to the Commissioner as soon as practicable after the close of each month, a statement showing the gross freight revenue derived from the transportation of tidewater cargo and bunker coal consigned to each tidewater port, to form the basis [fol. 18] of apportionment of the monthly expenses of the Exchange.

18. The Commissioner of the Exchange and his Deputies shall maintain such records as will be required to show disposition made of each car of tidewater coal shipped and to compile statistics which will indicate the average time per car per trip of all cars used for transportation at tidewater coal, and the average detention per car at each tidewater port.

19. Tidewater coal shippers and consignees must execute agreements of the Forms referred to in Regulation 16 and file one copy of each with the Commissioner and one copy of each with the proper officer of the interested carrier, before they begin shipment of tidewater coal to the Exchange.

20. The Executive Committee, Commissioner, and Deputy Commissioners shall at all times protect the quality of coal shipped into the pool through a system of inspection, and analysis if necessary in their opinion, and may at any time suspend shipments by any shipper when in their judgment the quality or preparation is below the proper standard.

21. The coal for transshipment on hand at tidewater ports or en route to such ports upon the effective date of the Exchange shall be disposed of as follows:

(a) Each carrier shall make an inventory on Form 1 of the tidewater coal on hand at each port as of 7 A. M. of the effective date, and under the direction of the Deputy Commissioner shall assign each shipment to the proper designated consigning pool.

(b) Coal shipments which arrive at tidewater ports subsequent to 7 A. M. of the effective date of the Exchange which were shipped [fols. 19 & 20] prior to that date shall be assigned to the proper pools in the same manner as provided in paragraph (a) of this rule.

(c) Agents at stations at which tidewater coal is billed should be instructed to bill in accordance with rules of the Exchange as of the effective date of the Exchange and on that date begin daily report as provided in Rule 4.

22. Joint meetings of the Executive Committee of the Tidewater Coal Shippers and the Railroad Committee shall be held monthly, special meetings to be held subject to the call of the Commissioner.

23. The effective date of the pooling rules and classifications of the Tidewater Coal Exchange will be different at the four ports. It will be as soon as practicable after July 1st, 1917, and proper announcement will be made by the Commissioner.

[fol. 21] III. Demurrer to Amended Petition—Filed December 30, 1924

Comes now the United States by its Attorney General and demurs to the Amended Petition filed in the above-entitled case on November 18, 1924, upon the ground that the facts alleged in said petition do not constitute a cause of action against the United States within the jurisdiction of this Court.

Robert H. Lovett, Assistant Attorney General. Howard J. Bloomer, Special Assistant to the Attorney General.

IV. Argument and Submission of Demurrer

On January 26, 1925, the demurrer in this case was argued and submitted by Mr. Howard J. Bloomer, for the defendant, and by Messrs. Carroll B. Low and John L. Steinbugler, for the plaintiff.

[fol. 22] V. Opinion—February 9, 1925.

Campbell, Ch. J.

Campbell, Chief Justice, delivered the opinion of the court.

The Government has demurred to the petition. Its averments are that plaintiff was engaged in the business of shipping Pocahontas smokeless coal and coke when, in November, 1917, the United States Fuel Administrator, acting under Executive order (a copy of which marked "Exhibit A" is attached to the petition) ordered plaintiff and other shippers of coal for transshipment at the ports of

Hampton Roads and others to consign all such shipments to the Tidewater Coal Exchange. This Tidewater Coal Exchange is alleged to be an unincorporated association of shippers of bituminous coal whose general purpose was to expedite the transshipment of coal from cars to boats at the named ports "and thus release rolling stock which would be made available" for moving more coal. The exchange had a system of rules (made an exhibit to the petition as Exhibit B) which provided for shipments to the exchange as consignee, and daily reports by the exchange showing the number of tons of coal reported shipped to date, amount unloaded into vessels "and the standing of each member in each designated consigning pool." The plaintiff was not a member of the exchange, but under the Fuel Administrator's order its rights were substantially those of a member. It did make shipments of coal consigned to the exchange, and it avers that the defendant, acting through the Fuel Administrator, "withheld from and failed to credit" plaintiff with coal shipped to the said exchange to a large amount, more than 34,000 tons, and failed to give plaintiff the proper credit until December 5, 1918. It is averred that during the period from November 11, 1917, to December 5, 1918, there was a ready market for the coal for export and for bunkering purposes at Lambert's Point, Hampton Roads, Virginia, to which place plaintiff made its shipments; and that the plaintiff would have disposed of its coal at a good price if proper credit for it had been given by the exchange, and on account of the failure to get the requisite notice and credit [fol. 23] plaintiff was subjected to damage stated at $50,000 brought about by the want of a market for coal when the error was discovered.

The petition founds the claim "upon the fifth amendment to the Constitution" and also upon section 145 of the Judicial Code.

If the theory of plaintiff is that there was a taking of its coal by the United States or under their authority it would yet be true that the right to bring suit in this court would not be founded upon the fifth amendment, but upon the existence of an implied contract entered into by the United States. See United States v. North American Co., 253 U. S. 330, 335; Klebe case, 263 U. S. 188, 191; 57 C. Cls. 160. The question, therefore, is whether there was an implied contract on the part of the Government to pay plaintiff's alleged damages or to pay for its coal shipped, as stated, but for which it was not given timely credit by the Tidewater Coal Exchange. While it is to be conceded that where the Government takes property of the citizen for public use without any claim of ownership or right to it in itself it impliedly promises to make just compensation therefor (Great Falls Mfg. Co. case, 112 U. S. 645; North American Co. case, 253 U. S. 330, 335), the circumstances may be such as to clearly rebut the existence of an implied contract. Horstmann & Co. case, 257 U. S. 138, 146; Klebe case, 263 U. S. 188, 191. It is not contended for plaintiff that the coal was requisitioned by the Fuel Administrator under section 10 of the Lever Act, 40 Stat. 276. That section confers power on the district courts to determine the controversies growing out of such a requisition. See Pfitsch case, 256 U. S. 549. We think there was no requisi-

tioning of the coal under that section or any other section of the Lever Act, nor was there any taking of plaintiff's property for public use. See Pine Hill Coal Co. case, 259 U. S. 191, 55 C. Cls. 433; Morrisdale Coal Co. case, 259 U. S. 188, 55 C. Cls. 310. The facts averred clearly rebut any implication of a contract by the United States to pay for the coal. In its essence the suit of plaintiff is one to recover damages for the omission, or negligence, of the Tidewater Coal Exchange as a designated agency of the Fuel Administration. The Government is not liable for the torts, misconduct, misfeasance, or laches of its employees. See Bigby case, 188 U. S. 400, 407; Gibbons case, 8 Wall. 269, 274; Hill case, 149 U. S. 593, 598.

The demurrer should be sustained and the petition dismissed, and it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 24] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the 9th day of February, A. D., 1925, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiff's petition, as amended. On consideration whereof the court is of opinion that the demurrer is well taken. It is therefore adjudged and ordered that the defendant's demurrer be sustained and that the plaintiff's petition, as amended, be and the same is hereby dismissed.

By the Court.

VII. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On April 10, 1925, the plaintiff filed a motion for a new trial.

On May 4, 1925, the court entered the following order on said motion:

Order

It is ordered by the court this 4th day of May, 1925, that the plaintiff's motion for a new trial be and the same is overuled.

[fol. 25] VIII. PETITION FOR APPEAL—Filed May 7, 1925

From the judgment entered February 9, 1925, in favor of the defendant in which the court sustained the demurrer and dismissed the petition, and from which judgment the court, on May 4, 1925, overruled the plaintiff's motion for a new trial, the plaintiff on May 7, 1925, makes application for and gives notice of an appeal to the Supreme Court of the United States.

Respectfully submitted, Walter Carroll Low, Attorney of Record for Plaintiff.

IX. Order Allowing Appeal

It is ordered by the court this 11th day of May, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 26] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case on demurrer; of the opinion of the court by Campbell, Ch. J.; of the judgment of the court; of the proceedings after entry of judgment; of the plaintiff's application for an appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 12th day of May, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 31,245. Court of Claims. Term No. 522. William C. Atwater & Company, Incorporated, vs. The United States. Filed June 2, 1925. File No. 31,245.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 17

WILLIAM C. ATWATER & COMPANY, INCORPORATED

Appellant

against

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR APPELLANT

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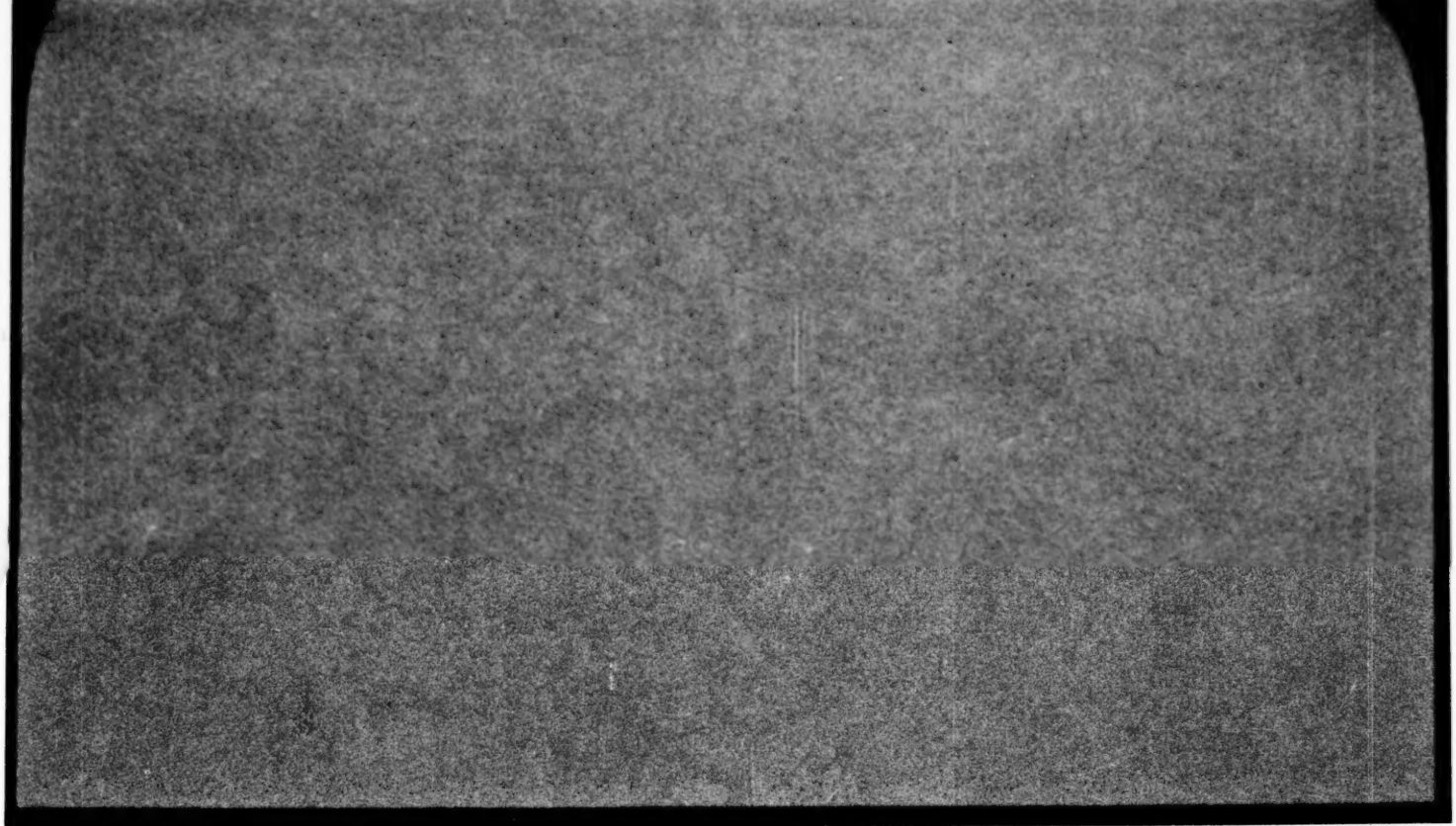

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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

The opinion of the Court below was officially reported in 60 C. Cls. 323.

Statement of grounds upon which jurisdiction of this Court is invoked.

This is an appeal from a judgment of the Court of Claims entered on the 9th day of February, 1925 (R., 13), which sustained the defendant's demurrer to the plaintiff's petition, as amended, and dismissed said petition. On April 10th, 1925, the plaintiff filed a motion for a new trial (R., 13) which motion, by order dated May 4th, 1925, was overruled (R., 13). On May 7th, 1925, the plain-

tiff made application for and gave notice of an appeal to this Court (R., 13). On May 11th, 1925, said application for appeal to this Court was allowed by the Court of Claims.

Jurisdiction of this Court is invoked by virtue of the provisions of former Sections 242 and 243 of the Judicial Code.

Statement of the Case.

Since this case comes before the Court on an appeal from a judgment sustaining a demurrer, it is only the facts alleged in the amended petition which are important.

Hence, the issue is a very narrow one, depending on rules of pleading rather than on the merits of the case.

To the pleading, it is submitted that the Court should apply a liberal construction in its favor and not a strict construction against it.

The amended petition (R., 1-11) speaks for itself. The allegations thereof, however, may be condensed as follows:

The claimant herein is a corporation organized under the laws of the State of New York engaged in the business of shipping Pocahontas smokeless coal and coke (R., 1).

In the month of June, 1917, an unincorporated association of shippers of bituminous coal to the Tidewater Ports of Hampton Roads, Baltimore, Philadelphia and New York, was organized and known as the Tidewater Coal Exchange, the general purpose of which association was to expedite the transshipment of coal, and rules were adopted for the management and operation thereof (R., 1), a true copy whereof is annexed to the amended petition marked "Exhibit B" (R., 7-11).

On or about the 6th day of November, 1917, the United States Fuel Administrator, acting under authority of an Executive Order of the President made in pursuance of the Act of Congress dated August 10th, 1917 (40 Stat. 276), issued an order, a true copy whereof is annexed to the petition marked "Exhibit A" (R., 4-7), under the terms of which order, the rules of the Tidewater Coal Exchange were adopted and approved, and the Commissioner of said Tidewater Coal Exchange was appointed the representative of said Fuel Administrator to carry out the provisions thereof (R., 2, 6).

Said order provided that every shipper of bituminous coal for transshipment at the ports above mentioned was required to consign all shipments to said Tidewater Coal Exchange in accordance with and subject to the provisions of the existing Tidewater Coal Exchange rules, with the same rights and liabilities respecting such shipments and the transshipment and delivery of the coal included therein as then applied to members of said Exchange (R., 5, 6), and said order further provided that no changes or additions should be made in said rules, without the approval of said Fuel Administrator (R., 2, 6).

The amended petition then alleges that under and by virtue of the terms of said order and the rules of the Tidewater Coal Exchange, defendant, acting through the United States Fuel Administrator, its duly authorized representative, represented and agreed that any and all coal shipped by any shipper of coal subject to said order should be credited to said shipper in accordance with the rules of the Tidewater Coal Exchange aforesaid, and with the custom and usage at all the times when said rules were in force (R., 2).

Claimant then avers that it shipped coal in accordance

with the terms of said order and rules, but that as to shipments made by the claimant between the dates of November 11th, 1917, and December 5th, 1918, "the defendant [United States], acting through said Fuel Administrator, its duly authorized representative, withheld from and failed to credit to the claimant" 34,143 net tons of coal, and did not credit the same to claimant until December 5th, 1918, on which date the claimant's coal credits were increased 34,143 net tons (R., 3).

Claimant then avers the market price of said coal during the period when it would have been entitled to credit under said rules as aforesaid, and the best prices obtainable by claimant on a sale thereof after said coal was credited to claimant on December 5th, 1918, when there was no market for most of said coal (R., 3, 4).

Claimant then claims damages or compensation based on the differences in said prices, in the sum of $50,000 with interest from the 5th day of December, 1918 (R., 4).

The rules of the Exchange show that coal was classified and shipped to pools (R., 7), from which a shipper was entitled to draw an amount of coal equivalent to that shipped by him, upon receiving credit for his shipments in the Exchange accounts (R., 8).

The facts aforesaid are alleged in two causes of action, the first cause of action being stated as founded upon the Fifth Amendment to the Constitution of the United States, the second cause of action being stated as founded upon an implied contract, jurisdiction of both being vested in the Court of Claims under the provisions of the Judicial Code, Section 145.

The defendant demurred upon the ground that the facts alleged in said amended petition did not constitute a cause of action against the United States within the juris-

diction of the Court of Claims (R., 11), and the demurrer was sustained upon the ground that said facts did not constitute a cause of action against the United States within the jurisdiction of any Court, *i. e.*, that the facts alleged constituted a *tort* for which the United States was not liable.

Summary of Argument.

No tort is alleged in the amended petition which is founded on authorized and rightful acts of the United States Fuel Administrator.

The question of authority is not before the Court as authority is admitted by the demurrer.

There was none the less a taking because the coal in question is not alleged to have been consumed. Destruction of value is as much a taking as physical appropriation. The power to sell and deliver the coal was a part of that aggregate of rights, privileges, powers and immunities which constituted the claimant's title and of that part it was deprived absolutely.

There was none the less a taking because the United States already had possession when the act of taking occurred.

Here, there are no facts rebutting the implication, as matter of law, of a contract to make compensation.

In the absence of a contract implied in law, a contract implied in fact is alleged in the amended petition.

ARGUMENT.

POINT I.

The Court of Claims erred in holding that this suit is based on a tortious act of an employee of the United States.

As was said by Mr. Justice HARLAN in *Bigby* v. *United States*, 188 U. S. 400, at page 405, "the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one."

In its opinion herein on the demurrer, the Court of Claims held (R., 13):

> "In its essence the suit of plaintiff is one to recover damages for the omission, or negligence, of the Tidewater Coal Exchange as a designated agency of the Fuel Administration. The Government is not liable for the torts, misconduct, misfeasances, or laches of its employees (See Bigby case, 188 U. S. 400, 407; Gibbons case, 8 Wall. 269, 274; Hill case, 149 U. S. 593, 598)."

On the contrary, the amended petition is wholly devoid of any allegation supporting this holding.

It is nowhere alleged therein that there was any omission or negligence or laches on the part of any employee of the Government. In fact the opposite is alleged. Said amended petition, Paragraph "Ninth," alleges in part as follows (R., 3, italics ours):

> "That * * * *the defendant*, acting through said United States Fuel Administrator, *its duly authorized representative*, withheld from and failed to credit your claimant with coal shipped by your claimant to said Tidewater Coal Exchange, as afore-

> said, to the amount of 34,143 net tons, which your claimant was ready, able and willing to receive at the time and times when your claimant was entitled to credit therefor under said order, and did not credit your claimant therewith until December 5th, 1918, * * *."

There is no allegation here of any wrongful act by the Fuel Administrator. The allegation is that he was *authorized* to act, that he *rightfully* withheld the coal. Indeed, the allegation goes further than this and states that the *defendant, i. e., The United States,* withheld the coal. The United States could not commit a wrong. The allegation is one of rightful withholding.

There is no allegation that there was any *error* made by the Fuel Administrator. The statement at the end of the statement of facts in the opinion of the Court of Claims on the demurrer herein (R., 12), to the effect that "the error was discovered" finds no justification in the allegations of the amended petition.

The amended petition clearly founds its cause of action upon an authorized act of the United States Fuel Administrator, not upon any tort, misconduct, misfeasance or laches committed by him. There was no assertion by the Fuel Administrator of title to the coal withheld. The Fuel Administrator had the power to withhold claimant's coal. It is alleged that he was authorized to exercise that power, and that he did so rightfully, not wrongfully.

It is submitted that *the allegation of authority* aforesaid is clearly *an allegation of fact* which the Government has *admitted by demurring herein.*

Therefore, although it is conceded that the Government is not liable for the torts, misconduct, misfeasances or laches of its employees, there were none such alleged in the case at bar.

POINT II.

The amended petition, as a first cause of action, alleges an implied contract by defendant to compensate the claimant for the taking of claimant's property for public use, because of the Fifth Amendment to the Constitution of the United States.

It will, of course, be conceded that where the Government takes property of a citizen for public use without any claim of ownership to it in itself, it impliedly promises to make just compensation therefor.

In order that a contract to make compensation be implied, there are the following requisites:

(1) Private property, title to which is recognized to be in an individual; (2) the taking thereof for public use; (3) by someone purporting to act for the United States; (4) authorized (a) himself directly or (b) by someone who is so authorized (c) to take specific property, or (d) to do an act necessarily involving such taking.

> *United States* v. *North American, etc., Co.*, 253 U. S. 330;
> *United States* v. *Lynah*, 188 U. S. 445;
> *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645.

"Private property" within the above rule does not necessarily mean corporeal, physical property. Patents are property within the rule and the right to make use of patent rights is also within the rule.

United States v. *Palmer*, 128 U. S. 269, was an action in the Court of Claims for the value of the use of a patent with the consent of the owner. Here there was a partial

use only of intangible property. The claimant still owned the patent despite its use by the United States and could license other people to use it. It was held that the claimant was entitled to recover upon an implied contract.

In the case at bar, the physical property involved was the coal which had been shipped to the Tidewater Coal Exchange, a Federal agency under the rules of the United States Fuel Administrator, *but the coal itself was not "taken"* by consuming the same. An equivalent amount of coal from the pools was returned to the claimant. What was taken was the *power to dispose* of the coal by sale and delivery from the time when it reached the Tidewater Coal Exchange and possession of it was acquired by the United States, until credit therefor was given to the claimant on December 5th, 1918.

It appears from the amended petition that title to the coal was always recognized by the Government to be in the claimant. The coal was shipped under the order of the Fuel Administrator and the rules of the Tidewater Coal Exchange which provided for the pooling of the *shipper's coal* (R., 7). It does not appear in the amended petition that any claim was ever made by the United States that it owned the coal, and the fact that the coal was eventually credited and its equivalent re-delivered to the claimant, was a recognition of its ownership by the claimant.

In order to constitute a "taking," it is not necessary that complete title to the physical property involved should be appropriated by the United States.

In *United States* v. *Russell*, 13 Wall. 623, the United States under a military emergency took into its service certain already officered and manned steamers of the claimant. The Court found that there was no intent to

"appropriate" them, but only to compel performance of the services needed and to use the same and to pay a reasonable sum therefor, and such was the claimant's understanding, and further that the property was returned to the exclusive control and possession of its owner as soon as the emergency was over. The Court held this to be no "appropriation" within the terms of an act divesting jurisdiction of the Court of Claims in such event (Act of Congress, July 4, 1864, 13 Stat. 381), and further held that the United States was liable on an implied promise to pay for the use of the boats and that the remedy of the claimant had been properly prosecuted in the Court of Claims, the Court saying that the Government may seize private property in time of war if the emergency is great, but is obligated on an implied contract to pay compensation therefor.

The above case is particularly pertinent to the situation in the case at bar. *There, also, the seizure was made under the war power. There was no taking of the steamers themselves but only of the use thereof, and it was held that the United States was under an implied obligation to make compensation therefor.*

In the case at bar, of course, there is no allegation that the United States "used" the coal. What the Government took was the *right, privilege and power to dispose of the coal* by retaining possession thereof after the claimant was entitled thereto under the Exchange rules, thus preventing a sale and delivery of the same. This is only an apparent difference between the cases and a consideration of the difference in the character of the property involved will show that it is not a basis for distinguishing them. In *United States* v. *Russell, supra,* the claimant was engaged, *not* in *selling* steamers but in *using* them.

He was in the business of navigation and consequently when his steamers were commandeered, compensation for the *use* of them placed him in the same position as he would have been in, had the ships not been commandeered. In the instant case, however, the claimant was in the business of *selling* coal. The coal was marketable property, intended to be sold and the *power to dispose* of the coal was very important, due to the fact that prices normally fluctuated, as they actually did in the case at bar; and consequently when the claimant was deprived of the possession of the coal and the attendant power to sell and deliver the coal, it was deprived of a very substantial property right, and the only way to put the claimant in the position in which it would have been if it had had the power to dispose of the coal, is to pay it the value of that power of disposition, which is sought in this action, namely, the difference between the prices which it would have obtained, if it had had the power to dispose of the coal, and the price which it actually obtained when the coal was finally put at its disposal.

The contention that in order to constitute a "taking" there must be an appropriation of the full legal title to the physical property involved, was finally disposed of in the case of *United States* v. *Cress*, 243 U. S. 316. In that case, the United States built a lock and dam in the Cumberland River which permanently caused periodical overflows which substantially injured, but did not totally destroy, the value of the land of Cress. A like improvement in the Kentucky River raised the water in a tributary in which one Kelly owned a mill and permanently ended the usefulness of the mill by destroying the head of water necessary to run it. It was held that both acts constituted a taking; that the power of the Government

to regulate commerce must be exercised subject to the restrictions of the Fifth Amendment to the Constitution if private property was taken in the exercise thereof; that it was immaterial that all the interest in the plaintiffs' land was not taken; that the plaintiffs were entitled to compensation to the extent of the injury suffered, even though the fee still remained in them; that when Cress was paid, the United States would have an easement of overflow upon his land, for which the payment would be compensation, and that Kelly would recover the amount of the depreciation in value of his property due to the loss of water power. In this case Cress also had a private way and ford appurtenant to his land, and it was held that damage to the land by reason of the destruction to the ford was also properly allowed. The Court said at pages 327 and 328:

> "That overflowing lands by permanent backwater is a direct invasion, amounting to a taking is settled by *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177; *United States* v. *Lynah*, 188 U. S. 445, 478-480. It is true that in the *Pumpelly Case* there was an almost complete destruction, and in the *Lynah Case* a complete destruction, of the value of the lands, while in the present case, the value is impaired to the extent of only one-half. But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether there is a taking * * * There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land

> still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain."

In the case at bar, likewise, it is clear that there was a sufficient "taking" even though the whole right of property of the claimant in the coal was not appropriated. The possession of the coal and the attendant power to dispose of the coal were part and parcel of that aggregate of rights, privileges, powers and immunities respecting the coal which constituted the claimant's title, and it was that part of which it was deprived. In the case at bar, the damage is clearly substantial. The actual loss to the claimant due to the deprivation of its power to sell and deliver its coal was $50,000, as is alleged in the amended petition (R., 4).

Furthermore, the fact that there is no allegation that the United States consumed the coal, does not make its action any the less a "taking."

In *United States* v. *Lynah*, 188 U. S. 445, the plaintiff owned land along the Savannah River. The United States built a dam which flooded the plaintiff's land necessarily and destroyed its value. There was no physical taking by the United States. It was said, at page 469, that destruction of value is a taking without any physical possession or conversion of the lands, and the Court cited *Pumpelly* v. *Green Bay Company*, 13 Wall. 166 and quoted from that case, page 177:

> "The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable

stream as the government had a right to for the improvement of its navigation.

"It would be a curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good which had no warrant in the law or practices of our ancestors."

and after reviewing various authorities the Court continued at page 470:

"It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee is vested."

and at page 471:

> "But if any one proposition can be considered as settled by the decisions of this Court, it is that although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation."

In the case at bar there was no physical consumption of the coal by the United States *but there was lawful possession of it by the United States throughout the entire period for which compensation is claimed, which took away its value to the extent of the compensation sought in this action.* The coal was shipped by claimant to the Tidewater Coal Exchange, a federal agency controlled by a representative of the United States Fuel Administrator, under the order of said Fuel Administrator, and thereby came into the possession and custody of the United States. But the order itself did not constitute a "taking" nor did the shipment thereunder, for the order *did not require* the claimant to ship any coal but provided only that if coal were shipped, it should be consigned to the Tidewater Coal Exchange. The acquiring of possession by the United States did not constitute a "taking." It was agreed that possession be taken to facilitate transshipment. It was the retention of possession after the time when the rules of the Tidewater Coal Exchange, under which the claimant had shipped the coal, entitled the claimant to credit therefor, without crediting the same, which constituted the "taking."

It is in this fact that the instant case differs from the cases of *Pine Hill Coal Co.* v. *United States*, 259 U. S. 191, 55 C. Cls. 433, and *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188, 55 C. Cls. 310. In those cases, pursuant to

regulations under Section 25 of the Lever Act (40 Stat. 284) authorizing the fixing of coal prices and the regulation and distribution of coal, the claimant's coal was sold by it to private buyers at a price fixed by the Government which was less than the claimant had previously contracted to sell it for to others. It was held that this constituted no taking and no contract was implied to indemnify the claimant for loss, the Supreme Court saying at page 190 of the *Morrisdale* case:

> "Making the rule was not a taking and no law-making power promises by implication to make good losses that may be incurred by obedience to its commands. * * *
>
> "If the law requires the doing of an act which is unconstitutional, the remedy is to refuse to obey it, not to sue the law maker."

In other words, in those cases the claimant sought to recover compensation for losses which it suffered when it voluntarily obeyed an order of the United States Fuel Administrator and sold coal not to the United States but to other private persons. In the case at bar, however, there is no claim that the making of the order requiring shipment to the Tidewater Coal Exchange was a taking. *The order did not require any shipment but only ordered that if any shipments were made, they should be made to the Tidewater Coal Exchange.* Moreover, when shipments had been made and custody and possession of the coal was taken by the United States Fuel Administrator in charge of the Tidewater Coal Exchange, said taking was rightful and there was clearly no intent on the part of the Government to pay, or the claimant to receive, compensation by reason thereof, so long as credit for the same was given in accordance with the rules. The claim-

ant, therefore, in the instant case does not seek compensation because it was required to consign to the Tidewater Coal Exchange all coal which it shipped, nor because it obeyed the order, and shipped coal to said Exchange. Claimant does seek compensation by virtue of the fact that under said order and rules, claimant was entitled to credit for an equivalent amount of coal and to delivery of the same, upon arrival at the Tidewater Coal Exchange of coal shipped by claimant, and that this credit was rightfully withheld. In other words, it was understood that the Government should take possession of the coal for the purpose of passing it through the Tidewater Coal Exchange without paying compensation, *but it was never understood that the Government should retain possession beyond the time when the claimant was entitled thereto under the Tidewater Coal Exchange Rules without paying compensation therefor.*

Since the sovereign can do no wrong, the Government is incapable of taking property for private use. Hence, an allegation of an act amounting to a "taking" by the Government, is equivalent to an allegation of a taking for public use under a fair construction of the pleading.

That the taking aforesaid was done by an officer of the United States, namely, the United States Fuel Administrator, is, of course, undisputed. *When consideration is given to the very broad war powers vested in the President and his agents, such as the Fuel Administrator, it cannot be said that the act of the Fuel Administrator was not authorized, and could not be shown by any proof to have been authorized.*

Section 1 of the Lever Act, 40 Stat. 276, provides as follows:

"Authority conferred; rules and regulations.—

That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential, effectively to carry out the provisions of this Act."

Section 2 of the Lever Act, 40 Stat. 276, provides as follows:

"The use of agencies and services of persons without compensation—In carrying out the purposes of this Act the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, to accept the services of any person without compensation, to cooperate with any agency or persons, to utilize any department or agency of the Government, and to coordinate their activities so as to avoid any preventable loss or duplication of effort or funds."

Section 25 of said Act, 40 Stat. 284, provides in part as follows:

> "Coal and coke; fixing prices; regulation of production and sale—The President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary."

As was said by Mr. Chief Justice CAMPBELL in *Pine Hill Coal Company* v. *United States*, 55 C. Cls. 433, at page 442, although the Lever Act provides for the agency of the Federal Trade Commission, yet the fact was that the President did not, and was not required by said Act to adopt this agency, *and the fact was that the agency adopted was the Fuel Administration.*

Under Section 10 of the Lever Act, 40 Stat. 279, the President was authorized to requisition fuels for the support of the Army or the maintenance of the Navy. It is submitted that the Fuel Administrator, even though he did not make such requisition, had the right to handle coal so that he would at all times have sufficient coal on hand at the Tidewater Coal Exchange subject to requisition for the Army or Navy in case of need. The power to requisition at the great tidewater shipping and coaling ports of Hampton Roads where claimant's coal was

shipped, was badly crippled unless there was power to keep coal on hand subject to requisition.

In time of war, there must have been thousands of other situations in which this act of the Fuel Administrator would have been within his powers.

It is submitted that this Court should not hold, as matter of law, that he was not authorized in this case without taking proof upon this question.

Further than this, it is submitted that on this demurrer, the question of authority is not properly before the Court, inasmuch as it is alleged as a fact in Paragraph "Ninth" of the amended petition that the United States acted through the Fuel Administrator and that the Fuel Administrator had authority (R., 3) *and this allegation of fact is admitted by the demurrer.*

In the opinion of the learned Chief Justice of the Court of Claims, it was said (R., 13):

> "While it is to be conceded that where the Government takes property of the citizen for public use without any claim of ownership or right to it in itself it impliedly promises to make just compensation therefor (*Great Falls Mfg. Co. case,* 112 U. S. 645; *North American Co. case,* 253 U. S. 330, 335), the circumstances may be such as to clearly rebut the existence of an implied contract. *Horstmann & Co. case,* 257 U. S. 138, 146; *Klebe case,* 263 U. S. 188, 191."

The above statement of the law is undoubtedly correct, but it is submitted that the case at bar is not within the principle of the two cases last above cited.

In *Horstmann Co.* v. *United States,* 257 U. S. 138, the plaintiffs were owners of lands surrounding lakes which were the source of soda supply. The Government carried

out an irrigation project which caused the lakes to rise 19 feet, destroying the value of the plaintiffs' properties. *It was found as a fact that no human knowledge could have predicted the result which occurred* and the Court held that this fact rebutted any implication of a contract by the United States and that any other result would deter the Government from useful enterprises from fear of immeasurable and unforeseen liability; but the principle that there might be a taking for public use without physical user or material benefit was recognized; in other words, that a diminishing of value was as much a taking as a physical possession.

In the above case, therefore, since no human knowledge could have predicted that there would have been a taking, it was obvious to the Court that no contract by the Government could be implied, but this is not authority for denying the implication of a contract in the case at bar where there was an actual and intentional physical taking of possession of the property in question, which everyone knows is of marketable kind and subject to price fluctuation.

In *Klebe* v. *United States*, 263 U. S. 188, a steam shovel was taken by an officer of the United States *claiming the right thereto under a conditional sales contract with a third person.* It was held that the right to sue in the Court of Claims was not founded on the Fifth Amendment to the Constitution but on an implied contract; that circumstances might be such as to rebut the existence of such a contract and that such was the case there where possession was taken under an asserted claim by the United States of a right to take by virtue of an express contract. It was contended that the Government's claim of right was not well founded but the Court held that

to be immaterial, saying that if the Government's claim was unfounded, the plaintiff's right was violated but his claim sounded in tort and was not within the jurisdiction conferred by the Tucker Act and hence that to decide that the Government was wrong in regard to the right to take under the express contract would not help the plaintiff any. This case, however, plainly differs from the case at bar, where the Government never made any claim to title to the claimant's coal but recognized its ownership and returned an equivalent amount of coal to it.

POINT III.

The amended petition, as a second cause of action, alleges a contract implied in fact by the United States to credit and redeliver to the claimant all coal shipped by it under the terms of the order of the United States Fuel Administrator, dated November 6th, 1927.

In considering this point it is desired to bear in mind the distinction between contracts implied in *fact* and contracts implied in *law*. As was said by Mr. Justice CAMPBELL in *Klebe* v. *United States*, 57 C. Cls. 160, 173:

> "The property was taken possession of because the Government officer asserted that an express contract gave it the right to purchase by paying the difference between what it had paid as rental, $4,225, and the stated valuation, $5,000. To claim that by the very act of exercising this asserted right, to purchase for $775 the Government made itself liable, upon an implied contract, to pay $5,000 involves a contradiction of terms. It ignores any distinction between express and implied agreements and *confuses that class of contracts which*

grow out of the dealings of the parties with the distinct class of implied contracts arising from the exercise of the sovereign right of eminent domain because of the fifth amendment.'"

In arguing this point, the claimant does not wish to consider that class of implied contracts arising from the exercise of the Government's right to take property or contracts implied in law, but is speaking only of contracts in the ordinary sense of the term, either express or implied in fact.

The factual contract relied upon by the claimant arises in brief as follows:

The Fuel Administrator issued an order dated November 6th, 1917. This order was issued in pursuance of the Act of Congress, August 10, 1917 (40 Stat. 276), known as the Lever Act. Section 25 of said Act, *supra, authorized the President to make said order,* and Section 2 of said Act, *supra, authorized the President to make contracts* for the purpose of carrying out the terms of said Act. Said order (R., 5, 6, 7) provided that all shipments of coal to Tidewater, made by any shipper of bituminous coal, should be shipped to the Tidewater Coal Exchange, theretofore an unincorporated association formed to facilitate the transshipment of coal at Tidewater, and thereby designated a federal agency for the purpose of carrying out said order, and further provided that said shipments should be made in accordance with the rules of the Tidewater Coal Exchange then in effect. Under said rules, and the custom and usage then in effect, the Tidewater Coal Exchange was obligated to credit shipments of coal to the owners thereof immediately upon their arrival at the Exchange, and no shipper was entitled to withdraw his coal until it had been so credited to him by the Exchange (R., 2, 7, 8). *But said order did not require any shipments to be made.*

By said order, then, the United States in effect made an offer to the claimant that if claimant would ship coal in accordance therewith to the federal agency known as the Tidewater Coal Exchange, said federal agency would credit to the claimant all coal so shipped, in accordance with the Exchange Rules aforesaid. This offer was accepted by the claimant when it shipped coal, and each shipment constituted a contract by the United States with the claimant to redeliver said coal or to credit the same, which was equivalent to redelivery, for the shipper was not entitled to delivery until credit had been given, in accordance with the Exchange Rules. The coal referred to in the amended petition herein was shipped but credit was not given to the claimant, without which claimant was not entitled to redelivery.

If there was a contract to credit and redeliver, it is immaterial why said credit was not given and redelivery not made to the claimant, whether because of error or negligence or rightful or wrongful act on the part of the Fuel Administrator or other officer of the United States. *The reason for failure to act in accordance with a duty imposed by contract is immaterial. The failure constitutes a breach of contract.* No citation of authority is necessary in support of so elementary a proposition.

The measure of damages is the same as the measure of damages for delayed delivery in the ordinary contract, namely, the difference between the market price at the time when the credit or redelivery should have been made, and the market price at the time when the credit or redelivery actually was made.

POINT IV.

The judgment herein should be reversed and the demurrer heretofore filed herein should be overruled.

There is nothing inconsistent in the causes of action alleged in the amended petition herein and considered respectively in the preceding points. The first cause of action discussed in Point II is founded upon an implied contract by the United States to pay to the claimant the value of the plaintiff's property taken for public use. The second cause of action discussed in Point III is founded upon a factual contract between the United States and the claimant under the terms whereof the United States agreed to credit and redeliver to the claimant in accordance with the rules of the Tidewater Coal Exchange all coal shipped by the claimant to said Exchange. In other words, the second cause of action is based on a breach of contract, and the first cause of action upon a taking of property. There was no less a taking of the plaintiff's property because the taker already had possession of it and was obligated on a contract to redeliver that property, nor was there any less a breach of contract because the act causing that breach also constituted a taking.

It is submitted that the Court should not be astute to dispose of a case on the pleadings where, as here, the Statute of Limitations would have run against claimant and it would be left remediless without ever having had an adjudication on the merits.

Respectfully submitted,

WALTER CARROLL LOW,
Attorney for Appellant.

CARROLL BLAKELY LOW,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 17.

WILLIAM C. ATWATER & COMPANY, INCORPORATED,
Appellant,

against

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

This brief is filed by the appellant in pursuance of leave granted by this Court on October 12th, 1927, when this case first appeared upon call and was submitted by counsel for both parties.

No attempt will be made herein to correct all of the statements in the brief for the United States which the appellant deems inaccurate, but only those questions will be touched upon which have been developed by the Government.

Argument.

With reference to the brief for the United States (p. 8), the contention therein that if there was any taking in the case at bar, it must have been under Section 10 of the

Lever Act (Act August 10, 1917, C. 53, 40 Stat. 276, 279), which authorized the President "to requisition foods, feeds, fuels," etc., is without merit.

A "requisition" is not synonymous with a "taking for public use." There may be a "requisition" without any "taking" and there may be a "taking" without any "requisition."

"Requisition" is a word, the meaning of which is the subject of substantial agreement among authorities.

In Bouvier's Law Dictionary, Rawle's Third Revision, Volume 3, page 2904, "requisition" is defined as "The act of demanding a thing to be done by virtue of some right."

In Volume 34 of Cyc., page 1627, "requisition" is defined as "The act of requiring or demanding."

In Webster's New International Dictionary "requisition" used as a transitive verb is defined: "To make a requisition or authoritative demand for, especially for military purposes"; and "requisition" used as a noun is defined as "The act of requiring or demanding as of right; a demand or application made by authority."

There is unanimity of opinion, therefore, that a "requisition" is a *"demand,"* as distinguished from a "taking."

The amended petition alleges no demand for appellant's coal by the Fuel Administrator. Hence, it does not allege any "requisition." This was the holding of the Court of Claims (Opinion, R., 12, 13).

But it does not follow that said amended petition does not allege a "taking." A "taking" may follow a demand constituting a requisition and be in pursuance of said demand. On the other hand, a "taking" as in the case at bar, may be pursuant to no demand. In the latter event, there is no requisition.

Section 10 of said Lever Act deals only with *requisitions*, and it is only where a *requisition* has been made

that jurisdiction of the Court of Claims has been ousted thereby.

The foregoing distinctions were recognized by this Court in the case of *Bedding Co.* v. *United States*, 266 U. S. 491.

In that case the United States admittedly requisitioned by a circular letter, certain cotton linters of the plaintiff but did not take or use the same, and said cotton linters remained at all times in the plaintiff's possession. Later, the United States started what was referred to in the report of the case as a "commandeering process" but did not complete the same, and at no time took possession of or used the plaintiff's property. The plaintiff sued in the Court of Claims claiming damages due to the fact that the goods had been held subject to the requisition, causing a loss in value. This Court held that there could be no recovery under the Dent Act, March 2, 1919, C. 94, 40 Stat. 1272, because the agreement, if any, had not been "performed in whole or in part" and no "expenditures had been made or obligations incurred on the faith thereof."

This Court further held that no recovery upon express contract could be had under the Tucker Act because the agreement, if any, had not been "reduced to writing and signed by the contracting parties" within Rev. Stats., Sec. 3744, and was wholly executory.

The Court then held as follows (italics ours):

> "Recovery cannot be had as upon an implied contract, because the only authority to *requisition* the linters was that conferred by §10 of the Lever Act (August 10, 1917, c. 53, 40 Stat. 276, 279); and proceedings under that section are not based on contract. Seaboard Air Line Ry. Co. *v.* United States, 261 U. S. 299, 304. Moreover, they must be brought in the District Court. United States *v.* Pfitsch, 256 U. S. 547.

> "We have no occasion, therefore, to consider whether the United States could ever be liable under the Tucker Act, as for a taking, for loss suffered through abandonment of the 'commandeering process,' where the owner had retained possession of the property and the Government had neither accepted, used, nor injured it. Compare Garrison *v.* City of New York, 21 Wall. 196; Bauman *v.* Ross, 167 U. S. 548, 598-9; Omnia Commercial Co. *v.* United States, 261 U. S. 502, 508-9. Nor need we consider whether it could have been held liable under the Lever Act, if suit had been brought in the District Court."

As there was a "requisition" in the *Bedding* case, the Court had no occasion to pass upon the question as to whether or not in the absence of the requisition, the United States would have been liable even though the owner retained possession. The implication, however, is that if there had been no requisition, the Court would have had to consider the question of liability, even without a showing of any disturbance of the plaintiff's possession.

In the case at bar, not only is there no requisition alleged, but there is alleged an actual taking of possession of the plaintiff's coal by the United States through the Fuel Administrator, and a withholding of the same, as is fully argued in the appellant's main brief.

With further reference to the brief for the United States (p. 10), the Government quoted from the case of *Merritt* v. *United States*, 267 U. S. 338, 341, as follows:

> "The practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to the common counts. It requires a plain, concise, statement of the facts relied upon."

The Government, however, failed to complete the quotation from the *Merritt* case which continues as follows:

> "See Rule 15, Court of Claims. The petition may not be so general as to leave the defendant in doubt as to what must be met." (Citing cases.)

It is submitted that the amended petition herein bears no analogy to the common counts and that it fully apprises the defendant as to what must be met, and that it fully complies with the requirements of pleading of the Court of Claims when given a fair construction.

With further reference to the brief for the United States, and to the oft repeated statement therein (see pp. 3, 4) that the function of the Tidewater Coal Exchange was merely to keep a record of credits in, and withdrawals from, the various consigning pools, the appellant respectfully requests the attention of the Court to Tidewater Coal Exchange Rules 9, 10 and 16 (R., 8, 9). Under Rule 9 (R., 8), the assignment of coal to members had to be authorized by the Exchange, and the Commissioner had the right to allow overdrafts from the various pools. Rule 10 (R., 8) contemplated such overdrafts and provided for adjustments in the event thereof.

Under Rule 16 (R., 9), deliveries of coal could be made by the railroads only on written orders of the Commissioner of the Exchange.

It therefore appears that the rules of the Exchange contemplated that the Commissioner should have discretionary powers to deal with the coal, not in any sense limited to the mere keeping of a bookkeeping record of shipments and withdrawals.

With further reference to the brief for the United States (pp. 13 and 14), the reference made by the Government to "paragraph 15" of the Exchange Rules has no application to the facts in the case at bar. The amended petition does not allege any controversy with reference to the operation of the Exchange. Further than this, it can-

not be seriously contended that the Executive Committee and Railroad Committee of the Exchange could award damages or compensation against the United States.

In conclusion it should be said that the object of the order of the Fuel Administrator (R., 4-7), was to increase the shipment and facilitate the distribution of coal, in order to aid the successful prosecution of the war, the support and maintenance of the army and navy, and to prevent local or general scarcity of coal (R., 5).

The order, however, did not *require* shipments of coal but only stated that *if coal were shipped,* it should be shipped to the Tidewater Coal Exchange. If, therefore, said order and the rules made a part thereof had been so construed at the time they were made as to place upon a shipper of coal an increased risk due to shipment in pursuance thereof, involving a parting of possession and control of the coal and no recourse in the event of a failure to currently receive an equivalent amount thereof, *the inevitable and obvious result would have been to prevent the operators from shipping in pursuance of said order and consequently to defeat the very purpose for which the order was made.*

It is submitted that at this late date this Court should not be quick to give to the facts set forth in the amended petition an interpretation which would have defeated the very purpose and object of the action of the Fuel Administrator in endeavoring to aid in the more efficient prosecution of the war.

Respectfully submitted,

WALTER CARROLL LOW,
Attorney for Appellant.

CARROLL BLAKELY LOW,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 17

WILLIAM C. ATWATER & COMPANY, INCORPORATED, Appellant

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 11–13) is reported in 60 Ct. Cls. 323.

JURISDICTION

The judgment of the Court of Claims, sustaining a demurrer to the appellant's amended petition and dismissing the petition, was entered February 9, 1925. (R. 13.) A motion for a new trial was filed on April 10, 1925, duly entertained, and overruled on May 4, 1925, and the petition for appeal was filed on May 7, 1925. (R. 13.) Jurisdiction of this Court is invoked under Sections 242 and 243 of the

Judicial Code as they stood prior to the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether the shipment of coal by the appellant to the Tidewater Coal Exchange, an unincorporated association of shippers of bituminous coal, pursuant to regulations of the United States Fuel Administrator requiring every shipper of bituminous coal for transshipment at any one of certain ports to consign all such shipments of coal to said Tidewater Coal Exchange, and the failure of the Tidewater Coal Exchange to credit the appellant promptly with certain shipments so made, give rise to an implied agreement on the part of the United States, enforcible in the Court of Claims, to reimburse the appellant for the loss caused by such delay.

STATUTE INVOLVED

Section 10 of the Lever Act (c. 53, 40 Stat. 276, 279) provides in part as follows:

> That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person

> shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies * * *.

STATEMENT

In June, 1917, an unincorporated association of shippers of bituminous coal to the tide-water ports of Hampton Roads, Baltimore, Philadelphia, and New York was organized and known as the Tide-water Coal Exchange. The general purpose of the association was to expedite the transshipment of coal from cars to boats at the above-mentioned ports and thus release rolling stock which would be made available to move a larger amount of coal. (R. 1.)

The organizers of the Exchange on June 20, 1917, adopted rules for its management and operation (R. 1), and a copy of said rules was attached to the appellant's amended petition (R. 7–11). It appears from these rules that the Exchange was a pooling arrangement under which shippers of coal of the same grade and classification were to pool their coal and each shipper was to load vessels with coal from a pool in which he had credit, but not necessarily with the specific coal shipped by him. The function of the Exchange was merely to keep

a record of credits in and withdrawals from the various consigning pools, to apportion demurrage, etc., and each member was responsible for providing vessels in which to transport the coal to his credit in the consigning pools.

On or about November 6, 1917, the United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States dated August 23, 1917, appointing said Administrator, and in furtherance of the purpose of said order and of the Act of Congress therein referred to and approved August 10, 1917 (the Lever Act, c. 53, 40 Stat. 276), issued an order (R. 2), a copy of which was attached to the appellant's amended petition (R. 4–7).

Said order recited, among other things, that it appeared to the Fuel Administrator that the production of coal intended for transshipment at the tidewater ports of Hampton Roads, Baltimore, Philadelphia, and New York, and ports near or usually considered as tributary to said ports, was being restricted, and that the loading of coal-carrying vessels and the unloading of coal cars at such ports and the movement, arrival, and return of such vessels and cars at and from such ports was congested and delayed by reason of the continuance of individual shipments of coal by various producers upon the lines of coal-carrying roads having terminal at the ports aforesaid, and of individual and distinct transshipments of such coal at such ports only to coal-carrying vessels specially chartered or

designated for the transshipment thereat of such individual shipments, and that the objectionable conditions could be largely eliminated by the employment of and cooperation with a common agency at each transshipment point. (R. 4–5.)

The order provided, among other things, that every shipper of bituminous coal for transshipment at any one of the ports at Hampton Roads, Baltimore, Philadelphia, and New York, and ports near or usually considered as tributary to said ports, should, on and after November 11, 1917, consign all such shipments of coal to the Tidewater Coal Exchange; that such shipments and consignments should be made by each such shipper in accordance with and subject to the provisions of the existing Tidewater Coal Exchange rules in the same way, to the same extent, and with the same rights and liabilities respecting such shipments and the transshipment and delivery of the coal included therein as under the terms of said rules applied to members of the Tidewater Coal Exchange. (R. 5–6.)

At divers times subsequent to November 11, 1917, and prior to December 5, 1918, the appellant shipped certain bituminous coal consigned to the Tidewater Coal Exchange in accordance with the terms of the order of the Fuel Administrator, but, according to the appellant's amended petition (R. 3):

> * * * the defendant, acting through said United States Fuel Administrator, its duly authorized representative, withheld

> from and failed to credit your claimant with coal shipped by your claimant to said Tidewater Coal Exchange as aforesaid to the aggregate amount of 34,143 net tons, * * * and did not credit your claimant therewith until December 5th, 1918, on which date said Fuel Administrator increased the amount of your claimant's coal credits by the said 34,143 net tons * * *.

The amended petition alleges that during the period subsequent to November 11, 1917, and prior to December 5, 1918, there was a ready and constant demand and market for coal at Hampton Roads, where the aforesaid coal was shipped by the appellant; that after December 5, 1918, there was practically no market whatever for a large portion of the coal withheld from the appellant, and that the appellant sold such coal at prices much lower than those prevailing prior to December 5, 1918. The amended petition claims damages or compensation based on the difference between the market price of the coal during the period when the appellant was entitled to credit for the coal under the rules of the Tidewater Coal Exchange and the prices obtained by it after the coal was credited to it on December 5, 1918.

The petition alleges as a first cause of action that the appellant's claim is founded upon the Fifth Amendment to the Constitution of the United States, and as a second cause of action that the appellant's claim is founded upon an implied contract.

SUMMARY OF ARGUMENT

If there was any taking of the appellant's right to the possession of its coal, such taking must have been under Section 10 of the Lever Act, and the appellant's remedy was in the District Courts, not in the Court of Claims. But there was no such taking by the United States for public use. The failure to credit the appellant with the coal shipped by it was the act of the Tidewater Coal Exchange alone. There are no allegations of fact in the petition indicating that the Exchange took the right to possession of the coal for public use. Moreover, the Exchange had no authority to requisition the coal or the right to its possession on behalf of the United States.

In the absence of a taking by the United States for public use, no agreement by the United States that the appellant should receive proper credit for coal shipped by it to the Tidewater Coal Exchange can be implied.

ARGUMENT

I

THERE WAS NO TAKING FOR PUBLIC USE OF THE APPELLANT'S RIGHT TO POSSESSION OF THE COAL SHIPPED BY IT, AND IF THERE HAD BEEN SUCH TAKING APPELLANT'S REMEDY WOULD HAVE BEEN IN THE DISTRICT COURTS AND NOT IN THE COURT OF CLAIMS

The appellant's first cause of action is based upon the theory that the United States took for public use and without any claim of ownership

the appellant's right to dispose of its coal, and that there was, therefore, an implied promise by the United States to pay just compensation for the property right so taken. It is admitted that the United States did not consume the coal, and that only the right of possession, if anything, was taken; and it is also admitted that neither the order of the Fuel Administrator that all coal shipped to certain ports should be consigned to the Tidewater Coal Exchange, nor the shipment of the coal so consigned, constituted a taking of the coal. The appellant's contention is that the taking took place when, upon arrival at the Tidewater Coal Exchange of the appellant's coal, credit for an equivalent amount of coal and delivery of the same was withheld from the appellant.

It seems clear, in the first place, that if there was any taking of the appellant's right to the possession of its coal, such taking must have been under Section 10 of the Lever Act (Act August 10, 1917, c. 53, 40 Stat. 276, 279) which authorized the President "to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense," and required him to ascertain and pay a just compensation therefor. Therefore the appellant's petition was properly dismissed by the Court of Claims, for this Court has decided that the District Courts have exclusive jurisdiction of controversies arising under Section 10 of the Lever Act. *United States* v.

Pfitsch, 256 U. S. 547; *Houston Coal Company* v. *United States,* 262 U. S. 361; *Bedding Co.* v. *United States,* 266 U. S. 491.

A second obstacle to recovery by the appellant on the theory that there was a taking of its right to possession of the coal shipped by it, or an equivalent amount of similar coal, is that the petition contains absolutely no allegations of fact showing any taking by the United States for public use. All that appears is that the appellant shipped certain coal to the Tidewater Coal Exchange and that some one "withheld from and failed to credit" the appellant with such coal as promptly as should have been the case. It is true that the petition alleges that this some one was "the defendant, acting through said United States Fuel Administrator, its duly authorized representative," but this allegation is manifestly no more than a statement of the appellant's conclusion that the failure of the Tidewater Coal Exchange to give proper credit was the failure of the United States. It is apparent that the failure to credit the appellant with the coal shipped by it was the act of the Tidewater Coal Exchange, and not of any officer or agent of the United States unless the Tidewater Coal Exchange can be regarded as such agent. The only fact set forth in the amended petition tending in any way to connect the United States with the transaction of which the appellant complains is the issuance by the Fuel Administrator of the order requiring shipments to the Tidewater Coal Exchange.

Under these circumstances two difficulties face the appellant. The first is that even if the Tidewater Coal Exchange had authority to requisition coal, or the right to its possession, on behalf of the United States, it does not appear that it took any such action for public use with respect to the appellant's coal. The failure to give the appellant proper credit may have been, and probably was, the result merely of negligence on the part of some employee of the Tidewater Coal Exchange. At any rate, there is absolutely nothing in the petition from which it can be inferred that there was, or that anybody thought there was, any benefit to the United States to be derived from the failure to give the appellant proper credit, or that the Tidewater Coal Exchange or any employee or agent thereof ever attempted to obtain any such benefit for the United States. It is clearly impossible for any court to remedy the lack of allegations of fact in the petition by speculation, such as the appellant indulges in, that the Fuel Administrator, even though he did not requisition the appellant's coal, failed to give the appellant proper credit in order that he might at all times have sufficient coal at the Tidewater Coal Exchange for requisition in case of need. As stated in *Merritt* v. *United States,* 267 U. S. 338, on page 341:

> The practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to the common counts. It requires a plain, concise statement of the facts relied upon.

That the Tidewater Coal Exchange had no power to requisition coal or the right to its possession on behalf of the United States seems equally clear. The Exchange was originally merely a cooperative organization for the purpose of facilitating the handling of coal by its members. The Exchange had nothing to do with selling or disposing of coal or with furnishing vessels on which to transport it. Each member disposed of his coal and furnished vessels to transport it in exactly the same manner as he would have done if the Exchange had not been in existence; the only effect of consigning the coal to the Exchange was that when it came time for a member to deliver coal to a vessel, delivery was not necessarily made from the specific coal which that member had shipped to the Exchange, but was completed by placing upon the vessel an equivalent amount of similar coal. The order of the Fuel Administrator did no more than to compel nonmembers of the Tidewater Coal Exchange, if they wished to ship coal at any of the ports at which it operated, to use the machinery which the members had already adopted. The terms of the order make it clear that it contemplated only pooling of coal to facilitate disposition thereof by shippers, not any taking or other interference with the right of a shipper to dispose of coal equivalent in amount to that shipped by him. Moreover, the order specifically provided that shipments should be made "in accordance with and subject to the provisions of the existing Tidewater Coal Exchange rules in the same

way, to the same extent, and with the same rights and liabilities respecting such shipments and the transshipment and delivery of the coal included therein, as under the terms of said rules apply to members of said Tidewater Coal Exchange." Prior to the order of the Fuel Administrator it is obvious that the Exchange would have had no right whatsoever to withhold or take coal from any member, and the order does not contain a word which would even suggest that the Fuel Administrator intended to enlarge the power of the Exchange in this respect. It is true that the order appointed the Commissioner of the Tidewater Coal Exchange as the representative of the Fuel Administrator "to carry out the provisions of this order," but, of course, this did not give the Commissioner any power more extensive than to enforce the other provisions of the order.

It follows that, if there were any taking of the appellant's right to possession of the coal shipped by it, such taking was entirely unauthorized and the United States is not liable. *United States* v. *North American Co.*, 253 U. S. 330, 333; *Sutton* v. *United States*, 256 U. S. 575, 580.

II

NO AGREEMENT BY THE UNITED STATES THAT THE APPELLANT SHOULD RECEIVE PROPER CREDIT FOR COAL SHIPPED BY IT CAN BE IMPLIED

As an alternative theory upon which to base its claim the appellant alleged as a second cause of action in its amended petition, and contends in Point

III of its brief in this Court, that by virtue of the terms of the order of the Fuel Administrator and the rules of the Tidewater Coal Exchange the United States agreed that the appellant should be properly credited with all coal shipped under the terms of said order. The appellant argues that such an agreement is necessarily to be implied from the facts and does not depend upon any taking by the United States.

In effect the agreement by the United States for which the appellant contends would be one to indemnify all shippers of coal to the Tidewater Coal Exchange against any loss resulting from errors or malfeasance in the operation of the Exchange. The contention does not merit extended discussion. The appellant does not refer to any statute authorizing the assumption of so extraordinary a liability. Moreover, in a number of cases this Court has refused to imply any contract subjecting the United States to obligation unless there is a taking by the United States for public use.

Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146.

Bothwell v. *United States*, 254 U. S. 231.

Morrisdale Coal Co. v. *United States*, 259 U. S. 188.

Pine Hill Co. v. *United States*, 259 U. S. 191.

Omnia Co. v. *United States*, 261 U. S. 502.

Interocean Oil Co. v. *United States*, 270 U. S. 65.

In addition it may perhaps be worth while to point out that Paragraph 15 of the rules of the

Tidewater Coal Exchange provided that controversies with reference to the operation of the Exchange which could not be adjusted by the Commissioner should be submitted to the executive committee and the proper railroad committee in joint session, and that their decison should be final, and that Paragraph (3) of the order of the Fuel Administrator specifically recognized such method of settling controversies, and provided that if any such settlement was unsatisfactory to any shipper subject to the provisions of the order, such shipper might appeal to the United States Fuel Administrator. There is no allegation in the petition that the appellant made any attempt to settle its controversy with the Tidewater Coal Exchange in the manner thus provided. If the United States made any contract to indemnify shippers against loss resulting from the operation of the Tidewater Coal Exchange, there can be no doubt that indemnity was to be conditioned upon settlement of the controversy in the manner expressly provided by the rules of the Exchange and the order of the Fuel Administrator.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
GARDNER P. LLOYD,
Special Assistant to the Attorney General.

OCTOBER, 1927.

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SUPREME COURT OF THE UNITED STATES.

No. 17.—October Term, 1927.

William C. Atwater & Company, Appellant, *vs.* The United States.	Appeal from the Court of Claims.

[November 21, 1927.]

Mr. Justice Butler delivered the opinion of the Court.

A demurrer to the amended petition was sustained; judgment dismissing the action was entered, and appeal was taken under §§ 242 and 243 of the Judicial Code, before the taking effect of the Amendment of February 13, 1925.

The substance of the allegations follows. Claimant was a shipper of coal. In June, 1917, there was organized an unincorporated association called the Tidewater Coal Exchange and rules were made for its operation. The purpose was to expedite the transfer of coal from cars to boats at certain Atlantic ports. August 23, 1917, the President, by virtue of the Lever Act, approved August 10, 1927, 40 Stat. 276, appointed a Fuel Administrator to carry out its provisions relating to fuel. The latter made an order that approved the rules of the exchange; designated its commissioner as his representative to carry out the order and rules; and required every shipper of coal for trans-shipment at such ports, on and after November 11, 1917, to consign the coal to the exchange in accordance with and subject to its rules. The defendant acting through the Fuel Administrator represented and agreed that any and all coal shipped subject to the order should be credited to the shipper in accordance with the rules of the exchange. The order and rules required that all coal shipped to such ports should be pooled with other shipments of the same classification, and that each shipper should be credited in the pools with coal equivalent to the amounts theretofore shipped by him. Claimant, at various times between November 11, 1917, and December 5, 1918, shipped coal to the exchange. "The defendant, acting through said United States Fuel

Administrator, its duly authorized representative, withheld from and failed to credit" claimant for coal to which it was entitled, amounting in all to 34,143 net tons. Claimant was not given credit for these amounts until December 5, 1918. It was ready to receive the coal at the various times the credits should have been given. And there are allegations to show that, by reason of the facts above mentioned, claimant was damaged in the sum of $50,000.

Claimant's narration strongly suggests that the failure to give it timely credits was due to some fault or negligence on the part of those operating the exchange. But, recognizing the rule that the Government cannot be held for tort (*Bigby* v. *United States*, 188 U. S. 400), it seeks recovery on the ground that its property was taken for public use entitling it to compensation under the Fifth Amendment.

No part of claimant's coal was consumed or appropriated by the Government. Claimant asserts that its power to dispose of the coal was taken and withheld until it got credit therefor. But, if that be assumed, there is nothing to indicate that the taking was for public use. Moreover, if property was appropriated for public use, the taking must have been under § 10 of the Lever Act (*Bedding Co.* v. *United States*, 266 U. S. 491), and the Court of Claims had no jurisdiction, as that section gave the district courts exclusive jurisdiction over controversies concerning compensation. *United States* v. *Pfitsch*, 256 U. S. 547; *Houston Coal Co.* v. *United States*, 262 U. S. 361.

Claimant contends that, even if there was no taking, the Government is liable on a contract implied in fact. It was not the Government's purpose to acquire any of claimant's property. The Fuel Administrator's order was made to expedite the movement of coal by subjecting it to the rules and operation of the exchange. And, as the credits were not withheld for any public purpose, the facts and circumstances alleged are clearly insufficient to imply an obligation on the part of the Government to indemnify claimant against losses due to delays and decline of market price. Cf. *Bothwell* v. *United States*, 254 U. S. 231; *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188; *Omnia Co.* v. *United States*, 261 U. S. 502. Indeed, the circumstances rebut the existence of such an agreement. *Klebe* v. *United States*, 263 U. S. 188, 191; *Horstmann Co.* v. *United States*, 257 U. S. 138, 146.

Judgment affirmed.